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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHASOM BROWN, WILLIAM BYATT, JEREMY DAVIS, CHRISTOPHER CASTILLO, and MONIQUE TRUJILLO individually and on behalf of all other similarly situated, Plaintiffs, v. GOOGLE LLC, Defendant.	CASE NO.: 4:20-cv-03664-YGR-SVK **[PROPOSED] ORDER DENYING DEFENDANT'S MOTION TO EXCLUDE OPINIONS OF PLAINTIFFS' DAMAGES EXPERT MICHAEL J. LASINSKI (DKT. 662)** The Honorable Yvonne Gonzalez Rogers Courtroom 1 – 4th Floor Date: September 20, 2022 Time: 2:00 p.m.

1   Before the Court is Google's motion to exclude all opinions proffered by Plaintiffs'

2 damages expert Michael J. Lasinski, Dkt. 662 ("Google's Motion"). Having considered the

3 parties' papers filed in support of and in opposition to Google's Motion, and all other matters

4 properly considered by this Court, the Court **DENIES** Google's Motion.

5   "Federal Rule of Evidence 702 permits opinion testimony by an expert as long as the

6 expert is qualified and his or her opinion is relevant and reliable. An expert witness may be

7 qualified by 'knowledge, skill, experience, training, or education.'" *Vizcarra v. Unilever United*

8 *States, Inc.*, 339 F.R.D. 530, 538 (N.D. Cal. 2021) (quoting Fed. R. Evid. 702). "Rule 702 permits

9 experts to testify if their testimony is: (1) based upon sufficient facts or data, (2) the product of

10 reliable principles and methods, and (3) the result of applying those principles and methods

11 reliably to the facts of the case. In determining whether an expert's testimony meets the standards

12 of Rule 702, the court acts as a 'gatekeeper' that 'ensur[es] that [the] expert's testimony both

13 rests on a reliable foundation and is relevant to the task at hand.'" *MediaTek Inc. v. Freescale*

14 *Semiconductor, Inc.*, 2014 WL 2854890, at *1 (N.D. Cal. June 20, 2014) (quoting *Daubert v.*

15 *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993)).

16   "The Ninth Circuit has reiterated that the 'test of reliability is 'flexible' . . . . When an

17 expert meets the threshold established by Rule 702 as explained in *Daubert*, the expert may

18 testify and the jury decides how much weight to give that testimony. Shaky but admissible

19 evidence is to be attacked by cross examination, contrary evidence, and attention to the burden

20 of proof, not exclusion.'" *Id.* at *2 (quoting *Primiano v. Cook*, 598 F.3d 558, 564-65 (9th Cir.

21 2010)). "'The focus of the district court's analysis must be solely on principles and methodology,

22 not on the conclusions that they generate,' and 'the court's task is to analyze not what the experts

23 say, but what basis they have for saying it.'" *Vizcarra*, 339 F.R.D. at 538 (quoting *Wendell v.*

24 *GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017)).

25   Here, Google seeks to exclude all of the opinions proffered by Plaintiffs' damages expert,

26 Michael J. Lasinski, including his opinions related to unjust enrichment damages, actual

27 damages, statutory damages, and apportionment.

28

1   As detailed in his report (Dkt. 608-9, the "Lasinski Report"), Mr. Lasinski is an

2   experienced damages expert who in this case based his damages calculations and opinions on

3   internal Google analyses, data, and programs. Mr. Lasinski's actual damages calculations are

4   based on the Google "Ipsos Screenwise Panel" program, where Google paid participants a

5   baseline rate in exchange for allowing Google to collect, save and use their browsing activity,

6   regardless of browsing mode. Lasinski Report ¶ 8. Mr. Lasinski's unjust enrichment calculations

7   are based on an internal Google analysis, ███

8   ███

9   Lasinski Report ¶ 7. As for statutory damages, Mr. Lasinski identified potential bases on which

10   any applicable rate can be applied, relying on Google's self-described "ground truth" records for

11   tracking Incognito page-loads. Lasinski Report ¶ 9. Mr. Lasinski also offers apportionment

12   opinions based in part on data produced by Google in this litigation. Lasinski Report ¶ 10.

13   Google has not shown that any of Mr. Lasinski's opinions should be excluded.

14   ***Mr. Lasinski properly assumed liability***. Mr. Lasinski properly relied on factual

15   assumptions consistent with Plaintiffs' theory of liability—that Google collected, saved, and used

16   private browsing information without consent. *See Williams v. Apple, Inc.*, 338 F.R.D. 629, 644

17   (N.D. Cal. 2021) (rejecting argument that "class members would have been uninjured if they

18   encountered 'widely circulated articles spanning the Class Period that disclosed Apple's

19   practice," as contrary to "settled contract law and Ninth Circuit precedent"); *Siqueiros v. Gen.*

20   *Motors LLC*, 2022 WL 74182, at *10 (N.D. Cal. Jan. 7, 2022) (damages expert was "entitled to

21   assume liability in order to model the damages" and assume "all Class Vehicles are defective").

22   Any disagreement Google might have with Mr. Lasinski's assumptions "is not a ground to

23   exclude [his] testimony altogether under *Daubert*." *Siqueiros*, 2022 WL 74182, at *11 ("Where

24   a party challenges the expert's assumptions, the challenges may go to impeachment, rather than

25   admissibility."). "Plaintiffs' expert is not required to accept Defendants' version of the facts."

26   *Aramark Mgmt., LLC v. Borgquist*, 2021 WL 4860692, at *3 (C.D. Cal. Sept. 29, 2021).

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1   ***Google's critiques of Mr. Lasinski's "Screenwise" model at most goes to weight.*** Mr.

2   Lasinski's selection of certain inputs in this case is not a basis for exclusion, including with

3   respect to the actual damages he calculated using the "Screenwise" input. Criticisms about the

4   "inputs used" are "classic criticisms that go to weight, not admissibility." *In re Juul Labs, Inc.*

5   *Mktg., Sales Pracs. & Prod. Liab. Litig.*, 2022 WL 1814440, at *20 (N.D. Cal. June 2, 2022).

6   Mr. Lasinski used as an input what Google has paid users (each month, per device) to participate

7   in studies that allow Google to collect, save, and use their browsing data, regardless of browsing

8   mode. Use of that input for calculating actual damages provides no basis for exclusion, and none

9   of Google's contention warrant exclusion for any of Mr. Lasinski's opinions.

10   ***Google's critiques of Mr. Lasinski's unjust enrichment model at most also go to weight.***

11   Mr. Lasinski has identified ample evidentiary support for his unjust enrichment calculations,

12   based on detailed documents and analyses conducted by Google employees, and also with his

13   opinion that there are ██████████████████████████████████

14   ██████████████████████ To the extent Google disagrees, it can cross-examine Mr. Lasinski and

15   present its argument to the jury. *See Gray v. Perry*, 2019 WL 2992007, at *19 (C.D. Cal. July 5,

16   2019) (any purported "failure to consider costs when calculating profits goes to the weight of

17   [expert] testimony and can be addressed on cross-examination."). Google's contentions provide

18   no basis to exclude any portion of Mr. Lasinski's opinions.

19   ***Google's arguments against Mr. Lasinski's proposed methods for apportioning an***

20   ***aggregate damage award are unavailing.*** Google's contentions regarding apportionment

21   provide no basis for any exclusion. Google has no interest in how to apportion any aggregate

22   award. "That is because when the only question is how to distribute the damages, the interests

23   affected are not the defendant's but rather those of the silent class members." *Six (6) Mexican*

24   *Workers v. Az. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990). Where "partitioning"

25   aggregate damages among class members "would not impact a defendant's liability for the total

26   amount of damages," the defendant has no standing to complain and any "individual

27   calculations" required to divide the pie would not defeat certification. *Ruiz Torres v. Mercer*

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1   *Canyons*, 835 F.3d 1125, 1140-41 (9th Cir. 2016). Here, Mr. Lasinski properly proffers two

2   methods to apportion any award ███████████████████████████████████████

3   ██ Finally, Google's apportionment critiques are

4   particularly misplaced in light of the Court's preclusion order: "Google may not use the fact that

5   only sampled data, not complete data, is available to challenge class certification generally or

6   attestations by individuals that they are members of the class." Dkt. 587 at 7.

7   ***Mr. Lasinski proposes reliable methods for calculating statutory damages.*** As it is the

8   Court's role to assess statutory damages, exclusion of Mr. Lasinski's opinions concerning those

9   damages are unwarranted. He has presented reliable bases on which the Court could apply any

10   applicable damages rate (should statutory damages be awarded in this case).

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14   **IT IS SO ORDERED.**

15   DATED: _____   _____

16   Honorable Yvonne Gonzalez Rogers
                                            United States District Judge

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[PROPOSED] ORDER DENYING DEFENDANT'S MOTION TO EXCLUDE LASINSKI'S OPINIONS
4:20-CV-03664-YGR-SVK